Supreme Court, U.S.
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No. 02-1508

In The
Supreme Court of the United States

LENORA MCNEIL,

*Petitioner,*

v.

SCOTLAND COUNTY,
NORTH CAROLINA,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

# BRIEF IN OPPOSITION

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The Respondent Scotland County ("Respondent") respectfully requests this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Fourth Circuit Court of Appeals in this case. The unpublished *per curiam* opinion of the Fourth Circuit is reported at 53 Fed. Appx. 242; 2002 U.S. App. Lexis 26140 (4th Cir. Dec. 18, 2002).

## STATEMENT OF THE CASE

Petitioner Lenora McNeil ("Petitioner") was formerly employed by Respondent in the Scotland County Department of Social Services ("DSS"). During the course of her employment, Petitioner was denied several promotions to caseworker positions and was eventually terminated on the basis of her admitted inability to perform her job. Petitioner filed suit in the United States District Court for the Middle District of North Carolina claiming, *inter alia*, that DSS's decisions not to promote her and to discharge her violated Title VII of the Civil Rights Act of 1964 because those decisions were allegedly in retaliation for her filing charges of discrimination with the Equal Employment Opportunity Commission.

In the District Court, Respondent presented undisputed evidence of the legitimate, non-retaliatory and non-discriminatory reasons for its employment decisions. Based on this undisputed evidence, the District Court allowed Respondent's motion for summary judgment on Petitioner's Title VII claim. In her appeal to the Fourth Circuit Court of Appeals, Petitioner again failed to dispute Respondent's reasons for its employment decisions, and the Court of Appeals affirmed the District Court's Judgment.

### A. Facts Related to Failure to Promote.

DSS hired Petitioner in February 1995 as a Clerk Assistant III. Petitioner performed adequately during her six-month probationary period for this position, but, following completion of her probationary period, Petitioner's performance steadily declined.

While employed by DSS, Petitioner expressed an interest in becoming a caseworker, but she lacked relevant experience. To help Petitioner realize her goal of becoming a caseworker, her supervisor assigned Petitioner to an Income Maintenance Technician I position in July of 1997. Petitioner remained responsible for her clerical duties in this new position, but she was given additional responsibilities, such as Medicaid eligibility reviews and client intake interviews, which were intended to provide Petitioner with relevant caseworker experience. Petitioner's performance as an Income Maintenance Technician I was unimpressive. When conducting eligibility interviews of Medicaid applicants, Petitioner frequently failed to obtain all required information. As a result, DSS often had to re-contact applicants to secure missing eligibility information. Petitioner's omissions caused unnecessary delays in processing Medicaid applications. Furthermore, Petitioner refused to seek guidance from her supervisors in approving and denying Medicaid applications, even though DSS repeatedly told her to do so. Her refusal to seek guidance resulted in erroneous disposition of numerous Medicaid applications. When errors were detected and returned to Petitioner for correction, she would not acknowledge the corrections or the errors. In addition, Petitioner failed to follow instructions on

several occasions and incorrectly authorized several cases. These mistakes resulted in the DSS being fined by the State of North Carolina.

As a Clerk III and Income Maintenance Technician I, Petitioner never exhibited the qualities that her supervisors required of a caseworker, such as the ability to work as a team member and the ability to get along with others in the office. Petitioner consistently projected a negative attitude toward her supervisors and fellow employees. Petitioner's attitude and inability to work as a team member caused significant problems. For instance, Petitioner's negative attitude caused caseworkers to choose to perform tasks that Petitioner should have been performing rather than ask Petitioner for assistance. Petitioner's negative attitude and inability to be a team player permeated virtually her entire employment history at DSS.

Petitioner exhibited these shortcomings throughout 1999, when she applied for the caseworker positions that are at issue in this case. As discussed *infra*, Petitioner was not selected for a caseworker position because she was never the most qualified candidate, due in large part to her negative attitude and inability to work with others.

**B. Facts Related to Discharge.**

Petitioner applied for and was granted leave under the Family and Medical Leave Act ("FMLA") on 8 June 2000. Except for a brief period in July 2000, Petitioner stayed out of work on FMLA approved leave until it was exhausted on 8 September 2000. Petitioner

was not prepared to return to work in September, so DSS chose to place her on discretionary unpaid leave until 31 October 2000.

By the conclusion of Petitioner's period of unpaid leave, DSS needed to fill her position because requiring other staff members to perform her duties was becoming an unacceptable burden on those employees who were required to shoulder her responsibilities. DSS notified Petitioner by letter dated 16 October 2000 of its need to fill her position on a full-time basis. In the same letter, DSS invited Petitioner to suggest options for covering her position and continuing her employment beyond October 2000. DSS cautioned Petitioner, however, that if no options were available that could reasonably be accommodated, she would be discharged. Petitioner offered no suggestions in response to the letter. On 30 October 2000, having received no suggested accommodations from Petitioner, DSS discharged her effective 31 October 2000. Soon thereafter, DSS filled Petitioner's position with a person who was available to perform the regular duties of that position on a full time basis.

## REASONS THE WRIT SHOULD NOT ISSUE

### I. PETITIONER DOES NOT REQUEST THE COURT TO ADDRESS A SIGNIFICANT OR BROADLY APPLICABLE LEGAL PRINCIPLE, BUT RATHER ASKS THE COURT TO EVALUATE THE FACTS OF THIS PARTICULAR CASE AND DETERMINE IF HER EVIDENCE WAS SUFFICIENT TO PROVE DSS'S STATED REASONS FOR ITS EMPLOYMENT DECISIONS ARE PRETEXT FOR RETALIATION.

Although Petitioner's statement of the "Questions Presented" suggests that Petitioner seeks reconsideration or modification of the long standing evidentiary standard applicable to motions for summary judgment in Title VII cases, the body of her Petition reveals that she actually requests the Court to issue a writ of certiorari for the sole purpose of reviewing (under the current standard) the evidence introduced in the District Court and to conclude that her evidence was sufficient to prove that DSS's articulated reasons for its employment decisions are pretext for retaliation. In short, Petitioner requests the Court to perform the function of a Circuit Court of Appeals and to issue a ruling that would impact only the litigants in this case.

Even if Petitioner actually seeks modification of the existing evidentiary standard, she does not suggest any new standard, nor does she demonstrate why a

new or modified standard is necessary. Any effort on her part to do so would be futile because the existing standard and this Court's decisions applying that standard provide adequate guidance to the lower courts and litigants on the issue of proving pretext.

The evidentiary standard applicable to motions for summary judgment in Title VII claims is well-established, straightforward, and easily applied, particularly to the uncomplicated and uncontroverted facts of this case. This Court established the effective burden shifting analysis applicable to Title VII cases in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), under which (1) a plaintiff is required to establish a prima facie case of discrimination or retaliation, (2) the defendant employer is then required to come forward with evidence of legitimate, non-discriminatory or non-retaliatory reasons for its employment decision, and, finally (3) the plaintiff has the burden of proving that the defendant's articulated reasons are not the true reasons for its decisions but were a pretext for discrimination or retaliation.

Since deciding *McDonnell Douglas*, the Court has provided ample guidance on the application of this standard as it relates to the proof that is necessary to satisfy the burden of proving that an employer's stated reasons for an employment decision are pretext for unlawful discrimination or retaliation. The Court explained in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), that the evidence presented by defendant to rebut a plaintiff's prima facie case serves "simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to

frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Id.* at 255-56, 101 S. Ct. at 1095, 67 L. Ed. 2d at 217. It is obvious from *Burdine* that a plaintiff must address head on an employer's articulated reasons for its employment decision, and demonstrate that those reasons were not the true reasons for the decision, if she is to have any chance of defeating the employer's motion for summary judgment. The Court later clarified in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), that proof that the employer's articulated reasons were false, together with elements of the prima facie case, would support a finding of pretext and intentional discrimination. Thus, the type of proof that an employee must produce in order to survive a motion for summary judgment when an employer presents legitimate reasons for its decisions is clearly defined - quite simply, the employee must present evidence that the employer's stated reasons for its employment decisions are false, or are not the true reasons for its decisions. *See also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

Petitioner does not advocate the rejection, extension or modification of the rulings from the above decisions. Her Petition for Writ of Certiorari contains no suggestion of how the foregoing decisions are flawed or inadequate to guide the district and circuit courts in rendering decisions in Title VII cases at the summary judgment stage. Indeed, from Petitioner's heavy reliance on the current decisions from this Court and the Fourth Circuit Court of Appeals in support of her argument that lower courts erred, it is evident that

she merely desires the Court to reconsider the evidence and to enter a decision in her favor under the existing standard. Clearly, Petitioner does not present an issue warranting consideration by this Court.

## II. THERE IS NO CONFLICT OF AUTHORITY BETWEEN THE FOURTH CIRCUIT COURT OF APPEALS AND ANY OTHER CIRCUIT COURT OF APPEALS THAT REQUIRES RESOLUTION BY THIS COURT.

Petitioner's only arguable challenge to existing law in the Fourth Circuit is her contention that the lower courts should not have given DSS's assessment of Petitioner's performance greater weight than the Petitioner's own assessment of her performance. This contention is in direct conflict with established precedent in the Fourth Circuit, as set out in *Beall v. Abbott Lab.*, 130 F.3d 614, 619 (4th Cir. 1997) (citing *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960-61 (4th Cir. 1996)) and *Hawkins v. PepsiCo, Inc.* 203 F.3d 274 (4th Cir. 2000) *cert. denied*, 531 U.S. 875, 121 S. Ct. 181, 148 L. Ed. 2d 125, *reh'g denied*, 531 U.S. 1031, 121 S. Ct. 613, 148 L. Ed. 2d 524 (2000). To the extent Petitioner relies on her apparent challenge to the rule in *Beall* and *Hawkins* to support her Petition, she fails to present a reason for this Court to grant the Petition. The Fourth Circuit's rule in *Beall* and *Hawkins* is in accord with every circuit court of appeals that has addressed the issue. *See, e.g., Shorette v. Rite Aid of Maine, Inc*, 155 F.3d 8 (1st Cir. 1998) (citing consistent decisions from the 4th, 7th, 10th, and 11th circuits); *Billet v. Cigna Corp.*, 940 F.2d 812 (3rd Cir. 1991) (citing

consistent decisions from 4th and 6th circuits); *Edmund v. MidAmerican Energy Co.* 299 F.3d 679 (8th Cir. 2002); *Shackelford v. DeLoitte & Touche, LLP*, 190 F.3d 398 (5th Cir. 1999). Thus, there is no conflict between the circuits for the Court to resolve.

## III. THE DECISIONS OF THE DISTRICT COURT AND COURT OF APPEALS WOULD BE AFFIRMED UNDER ANY EVIDENTIARY STANDARD BECAUSE PETITIONER FAILED TO ADDRESS RESPONDENT'S ARTICULATED REASONS FOR ITS EMPLOYMENT DECISIONS.

The Court should deny the Petition because, on the record before the Court, the Petitioner could not prove, under any conceivable standard, that DSS's articulated reasons for its employment standards were pretext for retaliation. Accordingly, granting the Petition would not alter the outcome of this case.

Petitioner's Title VII claim is based on her allegation that DSS retaliated against her for filing charges of discrimination with the Equal Employment Opportunity Commission when it denied her promotions to four caseworker positions in 1999 and terminated her in October 2000. DSS articulated numerous legitimate non-discriminatory and non-retaliatory reasons for each of its challenged employment decisions. Other than to vaguely dispute DSS's assessment of her work performance and conduct, Petitioner did not challenge the reasons stated by DSS for its decisions.

Petitioner was interviewed but not selected for caseworker positions in April, July and August of 1999.

DSS demonstrated that it did not select Petitioner for these positions because, in each instance, she was adjudged far less qualified than the other applicants based on the criteria considered by the DSS. For instance, Petitioner consistently scored relatively poorly on a standard written examination that was used as an initial screening device, even though she took the same test several times. DSS also produced undisputed evidence that Petitioner did not perform well in interviews, which were of critical importance in the selection procedure.

DSS's undisputed evidence showed that for each open caseworker position, all applicants were evaluated using the following five factors: (1) the attitude the applicants projected during the interview and their answers to the questions posed, (2) prior work performance and work experience, (3) how the applicants got along, or would get along, with (a) fellow employees and (b) the general public with whom caseworkers would be required to interact, (4) communication skills, and (5) demonstrated or projected initiative and ability to work on an independent basis.

In each instance Petitioner was interviewed, each of the interviewers determined, based on the five factors set forth above, that Petitioner was not the most qualified candidate. This determination was based on the generally negative attitude Petitioner projected during the interviews, her vague responses to questions, her lack of progress in her job and her job performance issues during her employment at DSS, her poor interaction and lack of teamwork with fellow employees, their belief (based on both the interviews and her work history) that she would not relate well to

the public the agency serves, and her failure to demonstrate appropriate initiative, independence and a sustained level of acceptable performance in her then-current position at DSS. Furthermore, the uncontradicted evidence demonstrated that all applicants selected for caseworker positions had much more relevant experience than Petitioner did.

With respect to the October 1999 position, DSS showed that Petitioner was not interviewed or selected because she was far less qualified for the position than the applicant who was selected. The person selected for the position had been employed by DSS for approximately 10 years as a caseworker and had enjoyed a successful work history as a caseworker. Petitioner had been with DSS for only approximately four years, had never held a caseworker position and suffered the shortcomings addressed above.

Under the *McDonnell Douglas* burden shifting analysis, once DSS articulated legitimate, non-retaliatory reasons for its employment decisions, Petitioner had the burden of coming forward with evidence demonstrating that DSS's articulated reasons were pretext for retaliation. Petitioner could not satisfy her burden of proving pretext with bald assertions of retaliatory motive, *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 281 n.1 (4th Cir.), *cert. denied*, 531 U.S. 875, 121 S. Ct. 181, 148 L. Ed. 2d 125, *reh'g denied*, 531 U.S. 1031, 121 S. Ct. 613, 148 L. Ed. 2d 524 (2000), or by showing simply that that DSS was aware that she engaged in a protected activity. *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994) (*citing Williams v. Cerberonics*, 871 F.2d 452, 457 (4th Cir. 1989)). As explained in *Burdine*, DSS's articulated reasons for its employment decisions framed the issues before the Court and put Petitioner

on notice that she must present evidence that the specific reasons articulated by DSS for its employment decisions were not the real reasons for its decisions. *Burdine*, 450 U.S. at 255-56, 101 S. Ct. at 1095, 67 L. Ed. 2d at 217; *Hawkins*, 203 F.3d at 281.

Even though there was clear direction from the Supreme Court and Fourth Circuit Court of Appeals as to what evidence Petitioner was required to produce to create a question of fact on the issue of pretext, Petitioner essentially ignored DSS's reasons for its promotion decisions and failed to raise even a weak inference that they were not the real reasons for DSS's decisions. She presented no evidence or argument suggesting that she was the better-qualified candidate for the positions she sought. She did not discuss, or even acknowledge the existence of, other job candidates in her arguments to the courts below. She presented no evidence (i) indicating that DSS did not honestly assess Petitioner's qualifications relative to the other applicants, (ii) showing that DSS's interview process was flawed or applied in a discriminatory fashion, or (iii) disputing that the successful applicants had better attitudes, better interpersonal skills, greater experience, and were otherwise better qualified for the caseworker positions when measured against the criteria used in DSS's selection process. Petitioner gave no more than passing mention to the interview and selection process in her arguments.

With respect to the November 1999 caseworker position that Petitioner claims to have been wrongfully denied, the uncontradicted evidence established that Petitioner was not considered for this position because she failed to submit an updated application in compliance with Respondent's personnel policies.

Petitioner conceded in her pleadings and in the lower court proceedings that her application was out of date and, therefore, ineligible for consideration. In addition, she presented no evidence showing that DSS's refusal to consider her application was caused by anything other than DSS's objectively reasonable compliance with its personnel policies. In short, as with the other caseworker positions, Petitioner presented no evidence that would support a finding that DSS's stated reasons for not selecting Petitioner for the November 1999 position was pretext for retaliation.

With respect to her termination, Petitioner failed to establish a prima facie case of retaliatory discharge. Petitioner's last protected activity was the filing of an EEOC charge of discrimination on 28 February 2000. Her discharge occurred approximately eight months later, on 31 October 2000, after Petitioner failed to report to work at the conclusion of her extended leave period. The remoteness of the protected activity from the termination defeated Petitioner's claim of retaliatory discharge. *See Hoven-Lewis v. Caldera*, 249 F.3d 259 (4th Cir. 2001) (addressing claim under Whistleblower Protection Act).

Even if Petitioner had established a prima facie case of retaliation, her retaliatory discharge claim was properly dismissed. DSS showed that it terminated Petitioner because she did not return to work after her extended leave period expired and she could perform no work for DSS at a time when it was necessary for DSS to fill her position. On 8 June 2000, Petitioner left work on leave allowed under the FMLA. Petitioner exhausted her FMLA leave on 8 September 2000, but she reportedly was unable to return to work at that time. Petitioner had no more accrued leave available

when her FMLA leave expired, but, rather than terminate Petitioner's employment at that time, DSS exercised its discretion and allowed Petitioner an additional 51 days of unpaid leave, until 31 October 2000. At the conclusion of this extended leave period, DSS needed to fill Petitioner's position on a full time basis because allocating Petitioner's duties to other staff members was becoming an unmanageable burden on the Department. By letter dated 16 October 2000, DSS notified Petitioner of its need to fill her position and invited her to suggest options that would allow the Department to keep her on the payroll. However, DSS expressly cautioned Petitioner that if there were no options that could reasonably be accommodated, she would be discharged on the basis of her unavailability. Petitioner never contacted DSS to discuss her options.

Petitioner never disputed that she was unavailable for work at the time of her discharge, and her unavailability was confirmed by her healthcare provider. Furthermore, according to Petitioner's healthcare provider, Petitioner could not have returned to work with DSS even as late as May 2001, approximately seven months after her termination. Because Petitioner had exhausted all of her available leave, could perform no work when DSS needed someone to perform her regular duties, and suggested no alternatives to preserve her job, DSS had no choice but to discharge Petitioner so that it could fill her position.

In summary, Petitioner presented no evidence upon which any court could conclude, under any conceivable standard, that DSS's reasons for not selecting Petitioner for promotions and for terminating

her employment were pretext for retaliation. The Court should, therefore, deny the Petition for Writ of Certiorari.

## IV. THE PETITION IS REPLETE WITH MISSTATEMENTS OF FACT.

The Court should deny the Petition for Writ of Certiorari because Petitioner's representation of the facts is inaccurate in many respects. The Court therefore cannot rely on the facts represented by Petitioner in deciding whether or not to issue a writ of certiorari. The following misstatements appear in the Petition:

1. Petitioner claims that (i) "there was no evidence offered in the record that the quality of her work was an issue until after she filed her EEOC charges," (Pet. p. 4), (ii) "there was no evidence in the record that prior to Ms. McNeils's first EEOC charge that she was ever guilty of misconduct or malfeasance of her duties," (Pet. p. 4), and (iii) that immediately after she applied for caseworker positions, DSS would intentionally criticize her work product in order to inhibit her advancement with DSS. (Pet. p. 4)

The record contradicts these statements. Petitioner filed her first charge of discrimination in November 1998. The record on appeal contains documented criticism and warnings relating to Petitioner's work product that date well in advance of this charge. Petitioner even admitted in her memorandum of law opposing DSS's Motion for Summary Judgment that she received two formal written warnings concerning her performance prior to ever filing a charge of discrimination.

Moreover, the record before the District Court and Court of Appeals contained examples of and references to numerous oral, verbal, formal and informal criticisms and warnings related to Petitioner's performance throughout her entire employment history with DSS, as opposed to only immediately after she applied for caseworker positions.

2. Petitioner claims that she was never given a permanent job description. This contention has no relation to DSS's articulated reasons for its employment decisions, but even if the contention was probative of pretext, it is demonstrably false. Petitioner filed exhibits in the District Court in which she refers explicitly to her supposedly nonexistent job description. It should also be noted that in the District Court Petitioner never related a single one of her work-related problems to the lack of a job description. The entire job description argument was an irrelevant afterthought, raised improperly for the first time in the Court of Appeals.

3. Petitioner claims that "it was uncontroverted that she made very few errors." (Pet. p. 4). This statement also is demonstrably false. The record before the District Court and Court of Appeals is replete with documented examples of Petitioner's errors, some of which resulted in DSS being fined by the State of North Carolina. Petitioner even conceded some of these errors in the exhibits she filed in the District Court.

4. Petitioner claims that DSS "created a paper trail of concocted and misleading representations about Ms. McNeil's work performance solely to impede her efforts to be promoted." (Pet. p. 5). This claim is false. Petitioner offered no competent evidence to support this claim. It is based strictly on Petitioner's self-

assessment of her performance and abilities, which, as addressed above, is not competent in any circuit to rebut an employer's evaluation of an employee's performance.

Furthermore, the claim that DSS "scrutinized" Petitioner's work does not prove, or even suggest, that Petitioner did not commit the errors cited in her written warnings or that her performance was not poor in other respects. More importantly, the claim of close scrutiny, even if it was true, does not relate to the interviews, selection process, and ranking of candidates that DSS relied upon in making hiring decisions for caseworker positions. At most, this evidence shows only a difference of opinion over the quality of Petitioner's performance, which is irrelevant to whether or not Petitioner was as qualified as other applicants for caseworker positions.

5. Petitioner claims that there was no evidence that she ever refused to perform her work (Pet. pp. 17, 18). However, Petitioner admitted engaging in this misconduct in her memorandum of law opposing DSS's motion for summary judgment. In addition, the affidavits of Petitioner's supervisors describe examples of Petitioner not taking direction from her supervisors and failing to perform her regular duties until her omissions were brought to her supervisors' attention and she was expressly directed to perform them.

6. Petitioner claims that DSS changed its stated reasons for not promoting Petitioner. This claim is a fabrication, and, like the job description argument, was improperly raised for the first time in the Court of Appeals. Petitioner asserts that DSS first took the position that she was not qualified for a caseworker position. (Pet. pp. 5, 16), that DSS later "modified their

(sic) contentions as to why Ms. McNeil was not considered for a promotion by claiming that it was her lack of teamwork and poor efforts that made her an unsuitable applicant," (Pet. pp. 5-6), and that "DSS then sought to balance their 'legitimate' reason for not fairly considering Ms. McNeil for each promotion by claiming that she was either not qualified or that she lacked the required interpersonal skills." (Pet. p. 6).

In the Court of Appeals, Petitioner cited the deposition testimony of one of her supervisors to support her claim that DSS "first took the position that she was not qualified." The cited portion of the transcript revealed, however, that Petitioner's supervisor was not asked why Petitioner was not promoted. Rather, Petitioner's counsel asked the supervisor a pointed question - was Petitioner qualified for caseworker positions - to which he responded she was not, based on his personal experience. The supervisor's concise response obviously was not an exhaustive description of the reasons Petitioner was not promoted or why she was not as qualified as the competing applicants.

In support of the alleged subsequent "modification" of DSS's reasons for not promoting Petitioner, Petitioner cited a memorandum that was actually drafted nearly two years before the above referenced deposition testimony was given, and which set out in great detail Petitioner's shortcomings as they relate to her multiple job applications and work performance. The memorandum actually described many more problems with Petitioner's performance than the two examples cited in the Petition.

Finally, to support her claim of the so called "balancing" of reasons, Petitioner referred to her supervisor's summary judgment affidavit, in which he described the interview process and all of the factors considered by DSS in determining that Petitioner was not the most qualified candidate for any of the caseworker positions for which she was considered. This affidavit does not contradict or conflict in any way with her supervisor's deposition testimony or the above referenced memorandum.

In summary, a review of the sources cited by Petitioner in support of her claim that DSS changed its reasons for its decisions will reveal that DSS consistently maintained that Petitioner was not the most qualified candidate for any caseworker position and will further reveal that none of the depositions, memoranda, or affidavits in the record contain contradictory statements concerning those reasons.

7. Petitioner claims that she demonstrated that DSS's assessment of her as not the most qualified candidate was pretextual because it conflicts with the deposition testimony of an employee named Jan Marie Fesmire, who testified that Petitioner met the minimal eligibility requirements for a caseworker position and was qualified for the position in that sense. (Pet. p. 5). This claim is highly misleading. Ms. Fesmire is a personnel assistant. Her role in the hiring process is to assemble job applications and to determine, as an initial matter, whether or not an applicant satisfies the basic eligibility requirements for a particular position. She serves no further function in the screening and selection process. She makes no hiring decisions, she does not interview candidates for any positions in DSS, and she makes no determination as to the relative

strengths, weaknesses, or qualifications of applicants for a particular position. Thus, contrary to what Petitioner is trying to convince the Court, Ms. Fesmire's statement that Petitioner was qualified, in the sense that she met the basic eligibility requirements of a caseworker position, does not conflict with DSS's determination that Petitioner was not the most qualified applicant for any of the caseworker positions at issue in this case.

8. Petitioner seems to contend that DSS's decisions to assign a few caseworker responsibilities to Petitioner refutes DSS's assessment of her abilities. (Pet. pp. 10-13). In making this claim, Petitioner ignores DSS's undisputed evidence that it gave Petitioner these relatively simple caseworker responsibilities in order to provide her with relevant experience, which was intended to make her a more attractive candidate for a caseworker position. Furthermore, this claim casts no doubt on DSS's honest assessment that, in spite of DSS's efforts to train Petitioner, she was not the most qualified candidate for any of the caseworker positions at issue in this case.

9. Petitioner seems to suggest that DSS articulated a false reason for terminating her. (Pet. p. 10). Petitioner contends that DSS told Petitioner she was terminated for not responding to a letter from a DSS representative, when, in Ms. McNeil's view, her representative did respond to the letter. Petitioner distorts the record to make this claim. The record accurately reveals the following: Approximately two weeks prior to the expiration of Petitioner's unpaid leave, DSS mailed a letter to Petitioner inviting her to suggest options for covering her position and continuing her employment. Petitioner completely

ignored this request, even though DSS cautioned Petitioner in the same letter that failure to agree on an option that could reasonably be accommodated would result in her termination. When Petitioner failed to contact DSS with a suggested accommodation by the specified deadline, DSS terminated Petitioner as it warned her it would. DSS mailed Petitioner a termination notice in which it referenced its earlier request that Petitioner contact DSS with suggested options and stated that because DSS had not heard from Petitioner, her leave without pay status and her employment would end effective 31 October 2000.

It appears that Petitioner might contend that a note from her healthcare provider purporting to further extend Petitioner's medical leave (for approximately the seventh time) was a response to DSS's request that Petitioner suggest options to continue her employment. Petitioner's argument defies common sense. In DSS's 16 October 2000 letter requesting options to continue Petitioner's employment, it informed Petitioner that her leave could not be extended any further. In light of DSS's clear statement that it could not extend Petitioner's leave, Petitioner's healthcare provider's note purporting to further extend the leave was non-responsive and could not be considered a suggestion of legitimate option for maintaining Petitioner's employment. Therefore, the reasons stated in DSS's 30 October 2000 letter for Petitioner's termination were accurate and truthful and were not contradicted by any evidence in the record.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

This the 14th day of May, 2003.

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